On September 10 and 23, 1991, and on December 6, 1991, three sessions of the contested case hearing were held in (city), Texas, with (hearing officer) presiding as hearing officer. At the first session, after the examination of respondent's supervisor by the parties and hearing officer, the direct examination of respondent and the presentation of certain documentary evidence, the parties determined that the hearing could not be concluded that day and agreed to recess the hearing and reconvene on September 23, 1991. The hearing resumed on September 23, 1991, with all parties present except the respondent who failed to appear. Respondent's attorney, (Mr. F), made an unsworn statement as to what he knew of respondent's failure to appear. No evidence was taken at that session and appellant moved to dismiss respondent's claim for his non-appearance. The hearing officer took the motion under advisement. On December 6, 1991, the hearing officer reconvened the hearing. The respondent appeared pro se since his attorney had ceased to represent him shortly after the September 23, 1991 session. After taking evidence and determining that good cause existed for respondent's failure to appear on September 23rd, the hearing officer heard the remainder of the evidence, closing statements, and concluded the hearing. The hearing officer determined in respondent's favor the sole disputed issue, namely, whether respondent had timely notified his employer of his injury. Appellant has timely challenged the hearing officer's finding of good cause for respondent's failure to appear at the hearing on September 23, 1991, as well as the determination that respondent timely reported his injury. No response to this appeal was filed by respondent.

DECISION

We affirm the hearing officer's findings, conclusions, and decision. The evidence was sufficient to support the finding of the hearing officer that good cause existed for respondent's failure to attend the resumption of the contested case hearing on September 23, 1991. Further, the findings of the hearing officer concerning the date respondent sustained his compensable injury and the timeliness of his reporting thereof were not so against the great weight and preponderance of the evidence as to be manifestly unjust, shock the conscience or clearly demonstrate bias. *See*, Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). That conclusions different from those drawn by the hearing officer may be drawn from the evidence or even find equal support therein does not provide a proper basis to set aside a decision. *See*, Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Appellant contends that when the hearing officer reconvened the contested case hearing at 10:00 a.m., on September 23, 1991, and the respondent failed to appear, the hearing officer should then have granted appellant's motion to dismiss respondent's claim because no "good cause" was then shown for respondent's failure to appear. By letter to the hearing officer dated September 30, 1991, appellant renewed its motion that respondent's claim be dismissed with prejudice because of respondent's non-appearance citing Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §§ 142.11, 145.17(d), and 145.19 (TWCC Rules). Although it should have been made a hearing officer's exhibit, this letter was not made a part of the record developed at the hearing below nor is it a part of appellant's written request for review before this panel. Accordingly, it will not be considered. TEX. REV. CIV. STAT. ANN. art. 8308-6.42(a) (Vernon Supp. 1992) (1989 Act). Appellant contends that it sought the dismissal of respondent's claim with prejudice after his non-appearance because no "good cause" had been shown for his failure to appear. In its "Request for Appeal," appellant relies on Rule 145.19 (TWCC Rules) which permits the entry of a default decision for the non-appearance of a party seeking relief absent a showing of "good cause." In the alternative, appellant asks us to decide that the

hearing officer, even if permitted by law to proceed to a determination of the existence of "good cause," erred in finding "good cause" based upon an unsworn, inadmissible letter from a friend explaining respondent's non-appearance, and otherwise erred in such finding in that it went against the great weight and preponderance of the evidence.

In his letter of October 17, 1991, responding to appellant's September 30 letter, the hearing officer advised that he was required to determine whether or not respondent had good cause for his failure to appear. He also advised appellant that the rules in Chapter 145 (TWCC Rules) apply to hearings provided by the Texas Workers' Compensation Commission (the Commission) under the Administrative Procedure and Texas Register Act (APTRA) and not to benefit contested case hearings. By letter to the parties dated November 20, 1991, the hearing officer notified them that the hearing would reconvene on December 6, 1991, and that respondent would be required to explain his non-appearance so that the hearing officer could, as a preliminary matter, make a determination as to whether there was "good cause" for respondent's non-appearance. Again, these letters were not made a part of the hearing record below and will not be considered on appeal. Article 8306-6.42(a) (1989 Act).

The Texas Workers' Compensation Act of 1989 requires that all parties attend the contested case hearing and provides that a party who does not attend without "good cause" as determined by the hearing officer commits a Class C administrative violation. Article 8306-6.34(f) (Vernon Supp. 1992) (1989 Act). *See also*, Rule 142.11 (TWCC Rules).

At the hearing on September 23, 1991, respondent's counsel, Mr. F, made the following unsworn statement: that after the hearing recessed on September 10, 1991, Mr. F instructed respondent to contact him the following week [September 15 - 21] to arrange an appointment; that (JM) subsequently called for respondent and made an appointment with Mr. F for Thursday [September 19] at which time the respondent, (carrier). (RR), JM, and possibly other witnesses would meet to prepare for the September 23rd hearing; that on September 19th, JM called to advise that they couldn't meet with Mr. F that day whereupon Mr. F instructed him to call Mr. F's office the following morning [Friday, September 20] to reschedule the meeting; that Mr. F never heard from JM or anyone else; that because a spanish language interpreter was used at the hearing on September 10th, Mr. F felt everyone knew the hearing was to reconvene on September 23; that Mr. F attempted, without success, to contact respondent by phone on the morning of September 23rd when he realized neither respondent nor his witnesses were present for the hearing; that Mr. F reached a woman by phone at an alternate number who indicated she thought she had heard respondent say that they were not going to have to be in (city) on September 23rd; that JM then called Mr. F at the Commission's office at about 10:45 a.m. on September 23rd asking if they were supposed to be there that day and, apparently, indicating he thought they understood they were to be at the hearing on Tuesday, September 24th, and relating that while one or two of the witnesses were in town, the respondent was in (city). Mr. F then asked for a recess of up to two weeks to try to contact respondent and discuss his plans and the possibility of obtaining other counsel. The hearing officer then took appellant's motion to dismiss under advisement and terminated the hearing. We do not find that the hearing officer abused his discretion in reconvening the contested case hearing to determine, *inter alia*, whether good cause existed for respondent's failure to attend the hearing on September 23, 1991. *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986); *Cf.* Texas Workers' Compensation Commission Appeal No. 91041 (Docket No. LR-91-058678-01-CC-CC41) decided on December 17, 1991. Appellant cites us to no authority, nor are we aware of any, which required the hearing officer to dismiss respondent's claim on September 23, 1991, on the basis that "good cause" for respondent's non-appearance

had not then been shown.

By letter of September 24, 1991 to JM, Mr. F stated that he couldn't understand how anyone present at the hearing on September 10th could have misunderstand the instructions to reconvene on September 23, 1991. Mr. F then advised he would no longer represent respondent, would forward respondent's file, and asked JM to read the letter to respondent and tell respondent to find another attorney if he wanted to continue his case. Once again, this letter was not made a part of the record below. On September 26, 1991, the hearing officer signed an "Order on Request to Withdraw As Attorney of Record" permitting the withdrawal of respondent's attorney.

At the hearing on December 6, 1991, the hearing officer admitted, over appellant's objection, an unsworn, signed statement dated December 5, 1991, from JM, a deacon at (Church) in (city) and a friend of respondent. JM recounted that he had called Mr. F at the Commission's office in (city) on September 23, 1991, and had advised Mr. F that respondent was then present in JM's office at the church. When JM asked Mr. F if he should send respondent directly to the hearing, Mr. F told him to wait for a call. According to JM, Mr. F never called back. On September 24th, JM called Mr. F at his office and was told Mr. F was dropping the case. The respondent then testified, through an interpreter, that on September 23, 1991, he was in JM's office for the purpose of having JM call Mr. F regarding the time for the resumption of the hearing on September 24th; that JM had asked Mr. F if respondent needed to go to (city) at once and that Mr. F instructed them to wait until he called back and that Mr. F never did call them back; that on September 24th, Mr. F told JM he was withdrawing from the case; and, that JM called the hearing officer in November 1991 inquiring about the status of the hearing and Mr. F's withdrawal. The hearing officer then stated for the record that JM had called him on November 7, 1991, regarding a resetting of the case and told him that respondent thought the hearing was to have resumed on September 24th.

The hearing officer considered respondent's language barrier, the fact that the interpreter at the September 10th hearing had advised respondent that the hearing was to reconvene on September 23rd but could extend into September 24th, respondent's lack of education and "sophistication," the written statement of JM, and the sworn testimony of respondent. After commenting that he accepted respondent's testimony, the hearing officer determined that respondent's burden to prove "good cause" for his non-appearance on September 23, 1991, had been met.

The hearing officer is required by the 1989 Act to "ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made . . . and may permit the use of summary procedures . . . including witness statements, summaries, and similar measures to expedite the proceedings . . . ." Article 8308-6.34(b) (1989 Act). Further, "The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence, and conformity to the legal rules of evidence is not necessary; . . . The hearing officer may accept written statements signed by a witness . . . ." Article 8308-6.34(e) (1989 Act). The hearing officer correctly reconvened the hearing to consider, *inter alia*, the issue of "good cause" for respondent's prior non-appearance. Having done so, we find the evidence sufficient to support his determination. *Compare*, Texas Workers' Compensation Commission Appeal No. 91052 (Docket No. HL-00001-91-CC-1) decided on November 27, 1991. Our finding of sufficient evidence on this issue does not mean we are satisfied with the time taken below to resolve such issue.

The sole disputed issue before the hearing officer which was unresolved at the benefit review conference was whether respondent had notified his employer of his injury not later than the 30th day after the date the injury occurred as required by Article 8308-5.01(a) (1989 Act). In its "Request for Appeal," appellant states that the hearing officer erred in making the following factual findings and contends they are against the great weight and preponderance of the evidence:

Finding No. 3:

On (date of injury), the Claimant was pushing a heavy container of chicken (called a combo, weighing over 1000 pounds) when he fell injuring his right arm, shoulder and back.

Finding No. 4:

The Claimant reported the injury to his supervisor, (RU), on March 12, 1991.

Finding No. 5:

The Claimant's testimony and evidence is inconsistent and contradictory in certain respects. These discrepancies are due to his inability to speak English and his limited educational background.

Finding No. 6:

The Claimant worked from (date) through (date of injury), doing his usual duties, without missing a day, and without showing any objective signs of an injury.

Finding No. 7:

The work record of Claimant indicates that the date of injury was more likely (date of injury).

Finding No. 8:

The Claimant was a satisfactory employee who missed little time from work, prior to (date.

Appellant also states in its appellate pleading that its "exhibits and witnesses presented fully rebutted the hearing officer's decision . . . [and] established that claimant notified his employer on March 12, 1991 of his injury on (date)." Appellant thus concedes that respondent was injured and did notify his employer on March 12, 1991, and leaves as the sole challenged fact whether the injury occurred on (date), as appellant contends, or on (date of injury), as respondent contended at the hearing. Incidentally, after receiving correspondence from the parties concerning appellant's desire to raise the additional issues of "no injury" and "course and scope," the hearing officer on September 3, 1991, signed an "Order on Request For Addition to Statement of Disputes," which recited that the only ground for dispute of the respondent's claim timely raised by the carrier was that of failure to give 30 days notice of injury and which denied respondent's request to amend the statement of disputes. Respondent has not appealed that order. The correspondence was not made a part of the hearing record below and will not be considered. Article 8308-6.42(a) (1989

Act). The hearing record did establish, however, that the sole disputed issue was whether respondent timely reported his injury to his employer.

Respondent testified, through an interpreter, that he began work for (Employer) in November or December 1989 and had no prior job-related injuries. According to other evidence, respondent's duties involved the shoveling of meat from large plastic containers referred to as "combos" onto a conveyor belt. The combos were normally moved by a jack; however, if a jack was not available, several employees would push a combo which weighed approximately 1000 pounds. According to the respondent, on (date of injury), at some time between 1:00 p.m. and 1:30 p.m., he fell while pushing a combo and injured himself. Although he apparently finished the shift, he never returned to work for the Employer after (date of injury). Respondent said he wasn't able to notify his supervisor, (RU), of the injury until the following day, but then did so. Respondent signed an Employee's Notice of Injury on April 29, 1991, which stated the date of injury as "(date)." Respondent explained that he used that date instead of (date of injury), because he couldn't get in touch with RU until the day after the injury. Respondent explained that he didn't go to the Employer's nurse or to a doctor until later in March 1991, because he understood he needed a "pass" from RU first.

(JR), a co-employee, testified that he saw respondent slip and fall while helping several other employees push a combo of meat. He testified this event occurred on (date of injury), a Thursday, between 1:00 p.m. and 2:00 p.m., and that he later verified the date by looking at a calendar with respondent. RU testified at the first session of the hearing that respondent had worked for him the entire time of respondent's employment, and, that he had no complaints about respondent whom he regarded as honest and trustworthy. RU testified that respondent's last day of work was on (date of injury); that the line respondent worked on was shut down for belt repairs between (date) and February 24, 1991; that respondent never mentioned any injury prior to (date); that RU was out of town from (date) to February 25th when he returned to work and first learned that respondent was not at work; that he had understood respondent was ill at home with pneumonia; that respondent's roommate told RU on March 12, 1991, that respondent had injured his arm and couldn't sleep due to the pain; that respondent came to his house on March 12, 1991, and discussed his problems, asked for a loan, and related that he had injured his shoulder and arm though respondent didn't state a date of injury; that respondent told RU and (RS), the Employer's safety manager, at a meeting on March 18, 1991, that his injury occurred on the day RU suspended another employee, and, that there were no witnesses to the injury. RU further testified that he didn't know whether or not respondent was injured on (date), but did know he suspended the other employee on that date. RU later testified that respondent first told him of the injury on March 13 at RU's house; that respondent couldn't have told him of the injury on (date) as RU was out of town, and, that respondent had pointed out the date of (date), to RU on a calendar.

In addition to the conflicting testimony as to the dates of the injury and first notification to the employer, there was conflict in the documentary evidence. The "Carrier's Notice of Injury" showed the date of injury as "(date)," as did the "Employee's Notice of Injury or Occupational Disease and Claim For Compensation." Appellant's adjuster's filing form showed the date of injury as "(date)," as did the "Employer's First Report of Injury or Illness." The "Payment of Compensation or Notice of Refused/Disputed Claim" (TWCC-21) prepared by the respondent, and, the Employer's "Doctor's Referral" form also showed the date of injury as "(date)." The latter form also reflected respondent's visit to the doctor on March 18, 1991.

Respondent also adduced a written statement signed and sworn to by (IA) and (JR) which stated they were witnesses to respondent's injury on "(date), 1991." Respondent testified that those witnesses used the (date) date because that was the date respondent first reported his injury to his supervisor, RU. In a signed but unsworn statement, the Employer's safety manager stated that during the meeting in his office on March 18, 1991, with respondent and RU, the respondent advised that his injury occurred on (date); that respondent did not report it to his supervisor because the pain didn't hurt him then; and, that respondent couldn't remember whether anyone had seen his injury.

The hearing officer, having the opportunity to both observe the witnesses and review the documentary evidence, is not only best positioned to sift through the evidence and sort out the conflicts but is charged with doing just that under the 1989 Act. The credibility and weight to be given to the testimony of the respondent and that of the other witnesses, and to the various documents admitted, were matters for the hearing officer's sole judgment. Although respondent was a party with an obvious interest in the outcome of the hearing, his testimony could raise issues of fact. Gonzales v. Texas Employers Insurance Ass'n, 419 S.W.2d 203, 208 (Tex. Civ. App.-Austin 1967, no writ). As the finder of fact, the hearing officer is entitled to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The evidence could support findings contrary to those challenged by appellant. However, we conclude there is evidence from which the hearing officer could find that respondent sustained his compensable injury on (date of injury), and reported it to his supervisor on March 12, 1991. *See*, Texas Workers' Compensation Commission Appeal No. 92002 (Docket No. MO-91-114072-01-CC-1124) decided on February 19, 1992. The hearing officer's findings were not based upon insufficient evidence nor were they against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge